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No. (1)

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In The Supreme Court of the United States

MIGUEL ANGEL HERNANDEZ,

Petitioner,

v.

MICHAEL MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

Whether a conviction under the Georgia simple battery statute, O.C.G.A. § 16-05-23(a), qualifies categorically as a "crime of violence," and thus, an aggravated felony, for immigration purposes.

Whether this honorable Court should resolve a split between the Eleventh Circuit U.S. Court of Appeals and the Fifth, Sixth, Seventh and Ninth Circuits, as to what constitutes a "crime of violence" for immigration purposes.

PARTIES TO PROCEEDING

The Petitioner is Miguel Angel Hernandez. The Respondent is Michael Mukasey, the Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

Miguel Angel Hernandez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 513 F.3d 1336 (11th Cir. 2008). The opinion of the Board of Immigration Appeals affirming the final order of removal is unreported. The opinion of the Immigration Judge ordering the Petitioner removed from the United States is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, codified at section 1227(a)(2)(A)(iii) of Title 8 of the United States Code, provides that any alien who commits an aggravated felony is removable from the United States and is not eligible for any relief from removal.

Section 101(a)(43)(F) of the Immigration and Nationality Act, codified at section 1101(a)(43)(F) of

Title 8 of the United States Code, provides in relevant part that an "aggravated felony" includes: "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense), for which the term of imprisonment [is] at least one year."

Section 16 of Title 18 of the United States Code provides in relevant part that a "crime of violence" is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Section 16-5-23(a)(2) of the Official Code of Georgia Annotated provides that a person commits the offense of simple battery when he "[i]ntentionally causes physical harm to another."

STATEMENT

This case involves the issue of whether a violation of the Georgia simple battery statute, O.C.G.A. § 16-05-23(a), constitutes a "crime of violence," and therefore an aggravated felony for immigration purposes. The Eleventh Circuit held that it was categorically a crime of violence, relying on its own precedent and its perception of the Georgia courts' interpretation of the statute. However, in evaluating statutes with no significant differences, the Sixth, Seventh and Ninth Circuits have held the opposite. Hence, to resolve this split in the Circuits, this Honorable Court should grant a writ of *certiorari* in this case.

Petitioner is a native and citizen of Mexico. Petitioner adjusted his status to that of a lawful permanent resident in September 2004. In March 2005, Petitioner was charged, *inter alia*, with one count of simple battery, in violation of O.C.G.A. § 16-05-23(a)(2), in Gwinnett County, Georgia. The accusation specifically stated in relevant part that Petitioner "did unlawfully intentionally cause physical harm to Minerva Garcia Islas." On March 30, 2005, Petitioner pleaded *nolo contendere* to this one count of the accusation, and was sentenced to 12 months' imprisonment, with six days of time served and the balance to be served on probation. On December 2, 2005, the sentencing court revoked Petitioner's probation and sentenced him to 22 days' imprisonment.

On October 25, 2006, the Department of Homeland Security (hereinafter "DHS") initiated removal proceedings against Petitioner by serving him with a notice to appear (hereinafter "NTA"), which charged him with removability under INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i), for having committed a crime involving moral turpitude within five years after admission to the United States. The NTA also charged Petitioner with removability under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), for having committed an aggravated felony as defined in INA § 101(a)(43)(F), and more specifically, a "crime of violence" as defined in 18 U.S.C. § 16.

At a master hearing before the immigration judge (hereinafter "IJ") on January 9, 2007, Petitioner denied both charges of removability and

requested termination of proceedings. The IJ requested that both parties brief the issues by January 12, 2007. Before Petitioner could submit his brief, the IJ entered an order of removability on January 10, 2007.

In the order, the IJ found that the offense of conviction was not a crime involving moral turpitude because it was simple battery and there were no aggravating elements that were apparent in the record. However, the IJ found that the conviction was an aggravated felony because it was a "crime of violence." The IJ found that Petitioner's crime "clearly involves the use, attempted use, or threatened use of force upon the person or property of another as required by 18 U.S.C. section 16(a)." The IJ further held that Petitioner had been sentenced to at least one year, even though he had later been resentenced to 22 days, because the resentencing was the result of a probation revocation. Accordingly, the IJ sustained that charge of removability and ordered Petitioner removed to Mexico.

The BIA affirmed the IJ's decision. (CR2). The BIA relied on its precedent in Matter of Martin, 23 I&N Dec. 491 (BIA 2002), which held that offenses involving the intentional infliction of physical harm on another have as an inherent element the actual or threatened use of physical force, making them crimes of violence. The BIA noted the Eleventh Circuit's decision in Hicks v. Moore, 422 F.3d 1246 (11th Cir. 2005), in which it held that a similar Georgia offense was "obviously one of violence." The BIA further held that Petitioner

"remains sentenced to 12 months' confinement for such crime, regardless of any additional sentence due to the revocation of probation." Therefore, the BIA affirmed.

On January 18, 2008, the Eleventh Circuit denied Petitioner's petition for review in a published decision reported at 513 F.3d 1336 (11th Cir 2008). That Court found that Petitioner's simple battery conviction required more than simple physical contact with the victim, in that it required intentionally causing physical harm to the victim through physical contact. The Court found that its decision was supported by its prior decisions analyzing similar statutes. United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006), cert. denied __ U.S. __, 127 S. Ct. 2028 (2007); United States v. Llanos-Agostadero, 486 F.3d 1194 (11th Cir. 2007); Hicks v. Moore, 422 F.3d 1246 (11th Cir. 2005); United States v. Glover, 431 F.3d 744 (11th Cir. 2005). The Court further held that Georgia courts have interpreted Georgia's simple battery statute as requiring physical contact, and that any physical contact, however slight, requires the use of physical force and therefore the Court found the Georgia simple battery statute was categorically a crime of violence. The Eleventh Circuit also upheld the BIA's finding that Petitioner was sentenced to 12 months' confinement even after the probation was revoked.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's finding that Petitioner's conviction was an aggravated felony creates a true split in the Circuits, as at least four

other Circuits have ruled the opposite when construing statutes with language that was substantially the same as the language in the Georgia simple battery statute.

Any alien who commits an aggravated felony is removable from the United States and is not eligible for any relief from removal. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). The INA's definition of "aggravated felony" includes "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense), for which the term of imprisonment [is] at least one year." INA § 101(a)(43)(F). A "crime of violence" under 18 U.S.C. § 16, is described as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). The IJ's determination that a prior conviction constitutes an "aggravated felony" must be supported by clear, unequivocal, and convincing evidence. Woodby v. INS, 385 U.S. 276, 286 (1966); Obasohan v. U.S. Atty Gen., 479 F.3d 785 (11th Cir. 2007). In evaluating whether a person has committed a "crime of violence," the court is required to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime. Leocal v. Ashcroft, 543 U.S. 1, 5 (2004).

Petitioner pleaded *nolo contendere* to violating O.C.G.A. § 16-05-023(a)(2). This provision provides that a person commits the offense of simple battery when he "[i]ntentionally causes physical harm to another." O.C.G.A. § 16-05-023(a)(2).

The applicable caselaw demonstrates that Petitioner's offense of conviction was not a "crime of violence" under 18 U.S.C. § 16(a). Where, as here, a statute makes no distinction between conduct that is violent and non-violent, it cannot be said that all conduct that falls into that statute qualifies as a "crime of violence." Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir 2003). See also United States v. Arnold, 58 F.3d 1117, 1122 (6th Cir. 1995) (holding that where force may, but need not, be involved in the offense in question, court could not categorically determine that force was an essential element of the offense).

The Georgia simple battery statute does not require the use of any force at all, much less violent force. The statute criminalizes "intentionally causing physical harm to another," but says nothing about the means of causing such physical harm. See also Gonzalez-Garcia v. Gonzales, 2006 WL 346298 (5th Cir. 2006) (concluding that "offensive or provocative contact" does not necessarily involve the use of physical force). There are many things one could intentionally do to cause "physical harm" without using or threatening physical force (i.e. one could drop a banana peel in the path of another, causing him to slip and fall; one could pour a cup of hot coffee in to the lap of another; one could sneak up behind another on the edge of a balcony and scream, causing him to lose his balance and fall, etc., etc.). Because the accusation in the instant case is silent as to what Petitioner did to actually cause the alleged "physical harm" and one can be convicted under the Georgia simple battery statute without the threat or use of physical force, the conviction in

the instant case cannot constitute a "crime of violence" under 18 U.S.C. § 16(a).

A. At least four other Circuits have ruled that virtually identical statutes did not constitute a crime of violence, creating a true Circuit split.

The Fifth, Sixth, Seventh, and Ninth Circuits all have found that similar statutes did not constitute crimes of violence. In Larin-Ulloa v. Gonzales, the Fifth Circuit found that an alien convicted under the Kansas aggravated battery statute had not committed a "crime of violence." 462 F.3d 456 (5th Cir. 2006). In that case, the court found that the alien could have been convicted under Kansas Stat. Ann. § 21-3414(a)(1)(C) for "intentionally causing physical contact with another person . . . in any manner whereby great bodily harm, disfigurement or death can be inflicted." Id. at 468. The Court concluded that if Respondent was convicted under that provision, he did not commit a "crime of violence." Id. at 471.

In discussing the statute in question, the Fifth Circuit in Larin-Ulloa reasoned that the statute "does not require that the defendant intend to injure or use force on the victim or that the physical contact itself be violent, harmful, offensive, or even non-consensual." Id. at 466. The Court noted that there were several hypothetical situations that would involve violation of the statute that do not involve the use of physical force. One such scenario would be when a physician negligently injects a medication

to which a patient is extremely allergic. Another would be a dentist who negligently used non-sterile equipment to clean a patient's teeth. Id. at 467. It noted that "each of these situations involves intentional physical contact that creates a risk of great bodily harm, but that is also not the type of violent or destructive contact that constitutes a use of physical force." Id.

Although the statute at issue in the present case involves an intent to cause physical harm, it still does not require the type of violent or destructive contact that constitutes a use of physical force. One can intend to cause physical harm and yet not use physical force. The definition of "crime of violence" focuses on the use of violent force, and not on the intended result. Even if a person intends to cause physical harm, it cannot be a crime of violence unless the person used physical force. Because the statute at issue in this case does not require use of violent physical force, the Eleventh Circuit should have found that it was not a crime of violence.

It is noteworthy that, in an unpublished decision, the Fifth Circuit found that the exact statute under which Petitioner was convicted did not constitute a crime of violence. In United States v. Lopez-Hernandez, 112 Fed.Appx. 984 (5th Cir. 2004), the Fifth Circuit held that "[t]he Georgia offense is results-oriented and does not contain a requirement that the offender apply force, but rather, leaves open the possibility that harm to the victim might result from omission or from the actions of another person or animal controlled by the offender. Id. at 985. The Court cited a Georgia case which held that siccing a

dog on another amounted to battery under the Georgia statute. Id. at 986 (citing J.A.T. v. State, 133 Ga. App. 922, 933-34, 212 S.E.2d 879 (1975)).

In Flores v. Ashcroft, the Seventh Circuit held that Indiana's misdemeanor battery statute was not a "crime of domestic violence" under the INA. 350 F.3d 666, 672 (7th Cir 2003). A crime of domestic violence is a crime of violence where the victim is a spouse or other domestic partner. Id. at 668. The statute in question in the Flores case provided that a person commits the offense of misdemeanor battery if he or she "knowingly and intentionally touches another person in a rude, insolent, or angry manner," if that action "results in bodily injury to any other person." Id. at 669. The Court noted that the touching need only be minimal and can be indirect, "so a snowball, spitball, or paper airplane qualifies if it hits the target." It noted that the injury need not be more than a bruise or physical pain without trauma. Id. at 670. The Court reasoned, "[s]o if the paper airplane inflicts a paper cut, the snowball causes a yelp of pain, or a squeeze of the arm causes a bruise, the aggressor has committed a Class A misdemeanor. . . . It is hard to describe any of this as 'violence.'" Id.

While noting that all batteries involve a touch and every touch involves the application of some force, the Seventh Circuit reasoned that not every touch falls under the definition of § 16(a) as a use of physical force The Court concluded: "To avoid collapsing the distinction between violent and non-violent offenses, we must treat the word 'force' as having a meaning in the legal community that

differs from its meaning in the physics community. The way to do this is to insist that the force be violent in nature – the sort that is intended to cause bodily injury, or at a minimum likely to do so." Id. at 672. Accordingly, the Seventh Circuit held that the offense in question was not a "crime of violence" as defined in 8 U.S.C § 16(a).

Similarly, in the present case, the statute makes no distinction between physical harm that is violent and non-violent. One can have the intent to cause physical harm that is not violent in nature and does not constitute the use of physical force. Because the indictment in this case is completely silent as to the means by which Petitioner caused "physical harm" to the victim, and is also silent to the "physical harm" which was caused, the IJ could not have concluded that the offense involved the "use of or threat of physical force."

The Sixth Circuit has held that Tennessee's assault with intent to commit sexual battery offense included elements that could and could not constitute a "crime of violence" under 18 U.S.C. § 16(a), necessitating a remand to examine the language of the indictment. United States v. Arnold, 58 F.3d 1117, 1122 (6th Cir. 1995). That case involved a determination of whether a federal defendant was entitled to a lower offense level under the Sentencing Guidelines for being a felon in possession of a firearm if that firearm was solely for lawful sporting purposes. The defendant would be ineligible for the sentencing reduction if his prior conviction under the Tennessee assault statutes

constituted a "crime of violence" as defined in 18 U.S.C. § 16(a). Id. at 1119-1120.

The Tennessee statute of assault with intent to commit sexual battery defined sexual battery as unlawful sexual contact with another person accompanied by one of three aggravating circumstances listed in the disjunctive. The circumstances were (1) use of force or coercion; (2) that actor's knowledge that the victim is mentally deficient or physically incapacitated; or (3) the actor's successful perpetration of fraud to accomplish the contact. Id. at 1121-1122. The Sixth Circuit reasoned that, because the circumstances were listed in the disjunctive, force may, but need not, be involved in an assault with intent to commit sexual battery under Tennessee law, and thus, the Court could not conclusively find that force was an essential element of the offense. The Court specifically noted that it could not rely on information in the presentence investigation report to determine the conduct in the particular case because the court's inquiry must "stop short of embracing the actual conduct underlying a prior conviction." Id. at 1122. Hence, the Court remanded the case for the district court to consider the language in the indictment. Id. at 1124.

Arnold stands for the proposition that, if a particular statute encompasses some behaviors that do fall under the definition of "crime of violence," and others that do not, the court must look beyond the statute to the conduct charged in the indictment. However, if, as is the case here, the indictment sheds no light on the conduct charged, the court cannot

reach the conclusion that the offense is a "crime of violence." See In re Sejas, 24 I&N Dec. 236 (BIA 2007) (noting that, where the conviction documents provide no specific facts regarding the conviction, there is no need to decide whether the statute is divisible or whether to employ the modified categorical approach, because the result would be the same). Here, the language of the statute encompasses some conduct that is a crime of violence – intent to cause physical harm that involves a use or threat of force -- and some that does not – intent to cause physical harm that employs no violent force or threats. Because the indictment tracks the language of the statute and provides no more information about the actual conduct that Petitioner committed, the IJ, the BIA and the Eleventh Circuit in turn, erred in concluding that he committed a crime of violence.

The Ninth Circuit held that battery under the California Penal Code is not categorically a "crime of violence" within the meaning of 18 U.S.C. § 16(a). Ortega-Mendez v. Gonzales, 450 F.3d 1010, 1012 (9th Cir. 2006). That case also involved a determination of whether an offense qualified as a crime of domestic violence, and, therefore, an aggravated felony for immigration purposes. Id. at 1013. The statutory definition of battery under California Penal Code § 242 is "any willful and unlawful use of force or violence upon the person of another." Id. at 1016. Parsing the language of the statute, the Ninth Circuit reasoned that non-violent force must suffice to meet the statute, or else the word "or" in "force or violence" would be superfluous. Id. It concluded that the phrase "use of force or violence" is "a term of

art, requiring neither a force capable of hurting or causing injury nor violence in the usual sense of the term." Id. The Court next noted that, in Leocal, the U.S. Supreme Court emphasized that a "crime of violence" must be violent in nature. Id. at 1020. Hence, the Ninth Circuit concluded that the statute in question was not a crime of violence, and therefore, not an aggravated felony. Id. at 1021.

Notably, nothing in the statute under which Petitioner was convicted requires the use of any force at all, much less violent force. The statute criminalizes "intentionally causing physical harm to another," but says nothing about the means of causing such physical harm. See also Gonzalez-Garcia v. Gonzales, 2006 WL 346298 (5th Cir. 2006) (concluding that "offensive or provocative contact" does not necessarily involve the use of physical force). Hence, the Eleventh Circuit should have found that Petitioner's offense was not a crime of violence. That Circuit's holding to the contrary creates a Circuit split that is ripe for resolution.

B. This Court should grant certiorari because the Eleventh Circuit's erroneous decision will have a huge negative impact on immigrant rights.

In reaching its conclusion in this case, the Eleventh Circuit states that it is merely accepting the Georgia courts' interpretation of their own statute. Hernandez, 513 F.3d at 1342 n.4. However, the cases it cites in support of its conclusion are not on point. Tuggle v. State, 145 Ga. Ct. App. 603, 244 S.E.2d 131

(Ga. App. 1978) deals specifically with the first prong of O.C.G.A. § 16-5-23, which is not the provision under which Petitioner was convicted. In fact, the court in Tuggle states that "[p]hysical contact is required for a simple battery." Tuggle, 145 Ga. App. at 604, 244 S.E.2d at 133. The provision under which Petitioner was charged does not require physical contact, but instead requires intentionally causing physical harm, which, as discussed above, can clearly occur without physical contact. O.C.G.A. § 16-5-23(a)(2). Moreover, the "physical contact" is only required for an "offensive touching" of an "insulting or provoking nature" as delineated in O.C.G.A. § 16-5-23(a)(1), which is not the violent "physical force" that is required to constitute a "crime of violence" under the Federal statutory scheme. See also Anderson v. State, 170 Ga. App. 634, 317 S.Ed.2d 877 (Ga. Ct. App. 1984) (wholly adopting the holding in Tuggle based on analysis of the same prong of the statute that Tuggle deals with). Therefore, the Eleventh Circuit could not merely accept the Georgia courts' interpretation of their own statute, as the Georgia courts had not analyzed the exact prong of the statute under the federal immigration scheme. Moreover, the Eleventh Circuit failed to acknowledge the Georgia case of J.A.T. v. State, 133 Ga. App. 922, 933-34, 212 S.E.2d 879 (1975) which held that "siccing a dog on another" constitutes battery in Georgia—clearly a case in which the actor does not touch or use physical force to harm the victim.

Additionally, the Eleventh Circuit incorrectly relied on its previous caselaw to support its holding. The issue in United States v. Griffith was whether the Georgia simple battery offense qualified as a

predicate offense to support a federal conviction under 18 U.S.C. § 922(g), the Armed Career Criminal Act, for possession of a firearm by anyone who has been convicted on a misdemeanor crime of domestic violence. 455 F.3d 1339, 1340 (11th Cir. 2006). The term "misdemeanor crime of domestic violence" is defined under federal law to include an offense that has, as an element, "the use or attempted use of physical force." Id. The Eleventh Circuit analyzed the first prong of O.C.G.A. § 16-5-23(a)(1) – again, the prong under which Petitioner was *not* convicted – and determined that "[a] person cannot make physical contact – particularly of an insulting or provoking nature – with another without exerting some level of physical force." Id. at 1342. Hence, that Court concluded that the provision qualified as a predicate offense for 18 U.S.C. § 922(g).

The Griffith case is not on point because it does not deal with the discrete issue of whether the Georgia offense of simple battery under O.C.G.A. § 16-5-23(a)(2) is a "crime of violence" under 18 U.S.C. § 16(a), and hence, an aggravated felony for immigration purposes. Moreover, it does not even deal with the particular provision under which Petitioner was convicted. Hence, it has no bearing on this case.

Finally, the Eleventh Circuit relied on its decision in United States v. Llanos-Agostadero, 486 F.3d 1194 (11th Cir. 2007). That case involved the issue of whether the Florida offense of aggravated battery on a pregnant woman, Fla. Stat. § 784.045(1)(b), constituted a crime of violence for Sentencing Guidelines purposes. Id. at 1195. That

offense had as an element that the person "[a]ctually and intentionally touches or strikes another person against the will of the other; *or* . . . [i]ntentionally causes bodily harm to another person." Id. at 1197 (emphasis in original). The Court held that this language described an offense that had as an element the use or attempted use of physical force.

In discussing Llanos-Agostadero, the Eleventh Circuit in the present case noted: "The Llanos-Agostadero Court did not distinguish between the two ways in which one can commit simple battery in Florida, thereby indicating that 'intentionally caus[ing] bodily harm to another'-- language virtually identical to the Georgia statute at issue here -- constitutes a crime of violence." Hernandez, 513 F.3d at 1341. However, the Court offered no analysis to support that conclusion in either Llanos-Agostadero, or in United States v. Glover, 431 F.3d 744 (11th Cir. 2004), the case on which it was based. See Llanos-Agostadero, 486 F.3d at 1341 (concluding that Florida simple battery on a pregnant woman was a crime of violence because the Court previously concluded in Glover that Florida simple battery on a law enforcement officer, which had the same material elements, was a crime of violence); Glover, 431 F.3d at 749 (laying out the elements of Florida simple battery of a law enforcement officer and the definition of "crime of violence," and concluding without analysis that the offense was a crime of violence). Because Llanos-Agostadero and Glover contained no meaningful analysis, the Eleventh Circuit should not have relied upon them.

It is clear from the above discussion that the Eleventh Circuit's decision in the present case is inapposite to at least four other Circuits. Hence, this Honorable Court should grant certiorari and resolve this split relating to an important issue affecting immigrants and immigrant rights, because immigrants convicted of the Georgia simple battery or other identical state statutes in some Circuits will not be aggravated felons under the Immigration and Nationality Act and in the Eleventh Circuit be classified as aggravated felons.

CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/

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The Fogle Law Firm, LLC

Attorney for Petitioner

ENTERED January 18, 2008

United States Court of Appeals
For the Eleventh Circuit

No. 07-12420

BIA No.
A70-952-769

MIGUEL ANGEL HERNANDEZ,

Petitioner,

Versus

U.S. ATTORNEY GENERAL,

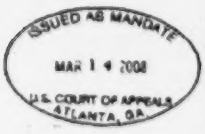
Respondent.

FILED
U.S. COURT OF
APPEALS
ELEVENTH
CIRCUIT
Jan 18, 2008
THOMAS K. KAHN
CLERK

Petition for Review of a Decision of the
Board of Immigration Appeals

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.



Entered: January 18, 2008
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

[PUBLISH]

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-12420
Non-Argument Calendar

BIA No. A70-952-769

MIGUEL ANGEL HERNANDEZ,

Petitioner,

Versus

U.S. ATTORNEY GENERAL,

Respondent.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Jan 18, 2008
THOMAS K. KAHN
CLERK

Petition for Review of a Decision of the Board of Immigration Appeals

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(January 18, 2008)

Before HULL, MARCUS and WILSON, Circuit Judges.

PERCURIAM:

Miguel Angel Hernandez petitions for review of a final order of the Board of Immigration Appeals

("BIA"), which affirmed the decision of an Immigration Judge ("IJ") finding him removable as an aggravated felon on the basis of his simple battery conviction in Georgia. After review, we deny the petition.

I. BACKGROUND

Hernandez, a native and citizen of Mexico, entered the United States as a lawful permanent resident in September 2004. In 2005, in the State Court of Gwinnett County, Georgia, Hernandez was convicted of one count of simple battery, in violation of Ga. Code Ann. § 16-5-23(a)(2). Section 16-5-23(a)(2) provides that "[a] person commits the offense of simple battery when he or she .. . [ijntentionally causes physical harm to another." Ga. Code Ann. § 16-5-23(a)(2). According to his Georgia indictment and conviction, Hernandez was convicted of having unlawfully and intentionally caused physical harm to Minerva Garcia Islas, in violation of Ga. Code Ann. § 16-5-23(a)(2).

The state court sentenced Hernandez to twelve months' imprisonment. The state court credited Hernandez with six days of time served and ordered Hernandez to serve the remainder of his twelve-month sentence on probation, subject to various conditions.[1] In December 2005, due to a violation of his probation conditions, the state court revoked Hernandez's probation. In its probation revocation order, the state court ordered Hernandez to serve twenty-two days in the Gwinnett County jail

[1] Among the conditions of Hernandez's probation was a requirement that he have "no violent contact with" Ms. Islas.

and continued the remainder of Hernandez's probation with the further requirement that Hernandez enroll in anger management.

In October 2006, the Department of Homeland Security ("DHS") issued Hernandez a Notice to Appear ("NTA"). The NTA charged Hernandez with, inter alia, removability pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony—a "crime of violence" for which the term of imprisonment imposed was at least one year. See 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii); 18 U.S.C. § 16.

Before the IJ, Hernandez admitted that: (1) he was a native and citizen of Mexico; (2) he was admitted to the United States as a lawful permanent resident in September 2004; and (3) he was convicted of simple battery in Georgia in March 2005. Hernandez nevertheless denied removability on two grounds. First, Hernandez argued that his simple battery conviction under Ga. Code Ann. § 16-5-23(a)(2) did not meet the relevant definition of a "crime of violence" because his conviction was not for "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). Second, Hernandez argued that his term of imprisonment on his conviction was not at least one year because the state court, in revoking his probation, changed his sentence from twelve months to twenty-two days.

The IJ rejected Hernandez's arguments and ordered Hernandez removed to Mexico. On appeal,

the BIA rejected Hernandez's arguments, determining that: (1) his simple battery conviction under Ga. Code Ann. § 16-5-23(a)(2) constituted a "crime of violence" under 18 U.S.C. § 16(a); and (2) he remained sentenced to twelve months' confinement for simple battery, "regardless of any additional sentence due to the revocation of probation."

Hernandez timely filed his petition for review in this Court.

II. STANDARD OF REVIEW

When the BIA issues a decision, we review only that decision, except to the extent that the BIA expressly adopts the IJ's decision. Al Najjar v. Ashcroft 257 F.3d 1262, 1284 (11th Cir. 2001). Here, because the BIA issued its own decision and relied on the IJ's findings, we will review both decisions. See id.

To the extent that the BIA's or the IJ's decisions were based on legal determinations, our review is de novo. Mohammed v. Ashcroft, 261 F.3d 1244, 1247-48 (1 lth Cir. 2001). We review the BIA's and the IJ's factual determinations under the substantial evidence test. Adefemi v. Ashcroft, 386 F.3d 1022, 1026-27 (11th Cir. 2004) (en banc).

III. DISCUSSION

A. Jurisdiction

As a preliminary matter, we must inquire into subject matter jurisdiction sua sponte whenever it

may be lacking. See Chacon-Botero v. U.S. Att'y Gen., 427 F.3d 954, 956 (11th Cir. 2005). The text of 8 U.S.C. § 1252(a)(2)(C) provides that "[n]otwithstanding any other provision of law ... no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section ... 1227(a)(2)(A)(iii)." 8 U.S.C. § 1252(a)(2)(C).

However, the REAL ID Act of 2005 in turn provides that "[n]othing in [8 U.S.C. § 1252(a)(2)(C)]... shall be construed as precluding review of constitutional claims or questions of law." REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) (codified at 8 U.S.C. § 1252(a)(2)(D)). Moreover, in Balogun v. United States Attorney General, 425 F.3d 1356, 1359-60 (11th Cir. 2005), this Court determined that the question of whether a conviction qualified as an aggravated felony under a different immigration provision was a question of law within our jurisdiction. Accordingly, we conclude that we have subject matter jurisdiction to review Hernandez's claims in his petition that his state conviction was not an aggravated felony for purposes of 8 U.S.C. § 1227(a)(2)(A)(iii).

B. "Crime of violence"

As discussed, an alien who has been convicted of an aggravated felony is removable. 8 U.S.C. § 1227(a)(2)(A)(iii). The term "aggravated felony" includes a "crime of violence," as defined by 18 U.S.C. § 16, for which the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(F). As relevant to

this case, 18 U.S.C. § 16 defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a).[2] In order to determine whether Hernandez's simple battery conviction qualifies as a "crime of violence" under 18 U.S.C. § 16(a), we must look to the "elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." Leocal v. Ashcroft, 543 U.S. 1, 7, 125 S. Ct. 377, 381 (2004).

Georgia's simple battery statute in § 16-5-23(a) provides that "[a] person commits the offense of simple battery when he or she either: (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another; or (2) Intentionally causes physical harm to another." Ga. Code Ann. § 16-5-23(a)(1)-(2). Georgia courts have interpreted this language to require actual physical contact for a simple battery conviction under either prong of the statute. See Hammonds v. State, 587 S.E.2d 161, 163 (Ga. Ct. App. 2003) (stating that § 16-5-23(a)(1) "contemplates a touching that does not result in injury, but is nonetheless insulting or provoking in character," while § 16-5-23(a)(2) "contemplates a touching that goes beyond insult to the infliction of pain or physical injury"); McKinney v. State, 463 S.E.2d 136, 139 (Ga. Ct. App. 1995) ("Physical contact is required for a simple battery but not for aggravated assault."); Lyman v. State, 374 S.E.2d 563, 565 (Ga. Ct App. 1988) (stating that §

[2] The government concedes that Hernandez's simple battery conviction is not a "crime of violence" under 18 U.S.C. § 16(b), which provides an alternate definition for the term.

16-5-23(a)(2) "concerns the intentional causation of physical harm, a touching which goes beyond insult to the infliction of pain"); Anderson v. State, 317 S.E.2d 877, 878 (Ga. Ct. App. 1984) (stating that a simple battery conviction under § 16-5-23 "requires physical contact"); Tuggle v. State, 244 S.E.2d 131, 133 (Ga. Ct. App. 1978) (same).

While we have not addressed § 16-5-23(a)(2), this Court has held that a conviction under § 16-5-23(a)(1) constitutes a "crime of violence" under 18 U.S.C. § 922(g). See United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006), cert-denied, _ U.S. _, 127 S. Ct. 2028 (2007). Section 922(g)(9) makes it unlawful for any person who had been convicted of "a misdemeanor crime of domestic violence" to possess a firearm or ammunition. 18 U.S.C. § 922(g)(9); Griffith, 455 F.3d at 1340-41. Although not an immigration case, Griffith is relevant here because a "crime of domestic violence" for purposes of § 922(g)(9) is defined to include an offense, inter alia, that "(ii) has, as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A). This is essentially the same definition of a "crime of violence" as in 18 U.S.C. § 16(a), the immigration statute at issue here. In Griffith, this Court discussed whether physical contact necessarily involves physical force and held that "[a] person cannot make physical contact—particularly of an insulting or provoking nature—with another without exerting some level of physical force." Griffith, 455 F.3d at 1342. In so holding, the Griffith Court expressly declined to insert the requirement of "violent" force before the words "physical force" in the statutory definition of "crime of violence" and concluded that

the simple physical contact made illegal by § 16-5-23(a)(l) satisfied the "use of physical force" definition of a "crime of violence" in § 921(a)(33)(A). Id.[3]

Here, Hernandez's simple battery conviction required more than simple physical contact with the victim; it required intentionally causing physical harm to the victim through physical contact. See Hammonds, 587 S.E.2d at 163. Given that Georgia courts have interpreted § 16-5-23(a)(2) as requiring actual physical contact that inflicts pain or injury, and in light of Griffith, we conclude that Hernandez's conviction under § 16-5-23(a)(2) constitutes a "crime of violence."

Our conclusion is bolstered by our decisions in United States v. Llanos-Agostadero,486 F.3d 1194 (11th Cir. 2007), and Hicks v. Moore, 422 F.3d 1246 (11th Cir. 2005). In Llanos-Agostadero, this Court considered whether it was proper for a defendant to receive a 16-level enhancement under the federal sentencing guidelines for having committed a "crime of violence" when the defendant's prior conviction was for the Florida crime of "aggravated battery on a pregnant woman." Llanos-Agostadero, 486 F.3d at 1196. Notably, in Llanos-Agostadero, the sentencing enhancement defined the term "crime of violence" just as it is defined in 18 U.S.C. § 16(a): an offense "that

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[3] In Griffith, this Court declined to follow Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003), relied upon by Hernandez along with Ortega-Mendez v. Gonzales, 450 F.3d 1010 (9th Cir. 2006), for the proposition that a statute must require "violent" force in order to qualify as a "crime of violence" under 18 U.S.C. § 16(a). See Griffith, 455 F.3d at 1345.

has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. (quoting U.S.S.G. § 2L1.2(b)(1) cmt. n.1(B)(iii)). Moreover, we stressed in Llanos-Agostadero that the Florida crime of "simple battery" is an essential element of the offense of "aggravated battery on a pregnant woman," and that a defendant commits "simple battery" under Florida law when he either "[1] actually and intentionally touches or strikes another person against the will of another; or ... [2] intentionally causes bodily harm to another person." Id. at 1197 (quoting Fla. Stat. § 784.03(1)(a)). In other words, the second subpart of the Florida simple battery statute is essentially identical to the second subpart of the Georgia simple battery statute—the subpart under which Hernandez was convicted.

The Llanos-Agostadero Court, citing our earlier decision in United States v. Glover, 431 F.3d 744 (11th Cir. 2005), concluded that:

> the offense of aggravated battery on a pregnant woman under Florida law has as an element that the defendant commit simple battery, and there is no persuasive reason why simple battery on a law enforcement officer is a "crime of violence," as this court held in Glover, 431 F.3d at 749, while simple battery on a pregnant woman (which constitutes aggravated battery) is not.

Id. at 1198 (internal citation omitted). The Llanos-Agostadero Court did not distinguish between the two ways in which one can commit simple battery in

Florida, thereby indicating that "intentionally caus [ing] bodily harm to another"—language virtually identical to the Georgia statute at issue here—constitutes a "crime of violence" in this circuit. Id. at 1197-98; see also Glover, 431 F.3d at 749 (reciting both ways a defendant can commit simple battery in Florida, including "[i]ntentionally caus[ing] bodily harm to another," and concluding that Florida battery on a law enforcement officer constitutes a "crime of violence" under the federal sentencing guidelines).

Our Hicks decision is also noteworthy. In Hicks, this Court considered, inter alia, whether a plaintiff's constitutional rights were violated when she was strip searched at a Georgia jail. The Court noted that the plaintiff was arrested and charged with the Georgia crime of family violence battery, "the elements of which are 'intentionally caus[ing] substantial physical harm or visible bodily harm' to a 'past or present spouse.'" Hicks, 422 F.3d at 1252 (quoting Ga. Code Ann. § 16-5-23.1) (alteration in original). The Court then held that the strip search of the plaintiff "violated no constitutional right," because the crime with which she was charged "is obviously one of violence. We accept that a person's being charged with a crime of violence is sufficient to evoke reasonable suspicion that the person may be concealing weapons or contraband." Id. at 1252-53 (emphasis added). While Hicks was not a § 16(a) immigration case, there is no meaningful distinction between the relevant elements of Georgia simple battery and Georgia family violence battery, and the Hicks Court unambiguously classified Georgia family violence battery—intentionally causing substantial

physical harm or visible bodily harm—as an "obvious crime of violence." Id. at 1252.

In light of Griffith, Llanos-Agostadero, Glover, and Hicks, we conclude that Hernandez's simple battery conviction under Ga. Code Ann. § 16-5-23 (a)(2), for "[i]ntentionally caus[ing] physical harm to another," constitutes a "crime of violence" under 18 U.S.C. § 16(a). The clear weight of precedent compels this conclusion, and we reject Hernandez's arguments to the contrary.[4]

C. Twelve months' imprisonment

Hernandez also contends that he was not convicted of an aggravated felony because he was not sentenced to at least twelve months' imprisonment on his simple battery conviction. Although Hernandez acknowledges that he was initially sentenced to twelve months' confinement for the offense in

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[4] We recognize that Hernandez argues, inter alia, that he could be convicted of simple battery under § 16-5-23(a)(2) if he put a banana peel in a victim's path, and the banana peel caused the victim to slip, fall, and sustain physical injury or harm. However, to date Georgia courts have interpreted Georgia's simple battery statute as requiring physical contact. See Hammonds, 587 S.E.2d at 163; McKinney, 463 S.E.2d at 139; Lyman, 374 S.E.2d at 565; Anderson, 317 S.E.2d at 878; Tuggle, 244 S.E.2d at 133. We accept the Georgia courts' interpretation of their own battery statute and see no meaningful distinction between subpart (a)(1) and (a)(2) of Georgia's simple battery statute in deciding whether a conviction for simple battery under that Georgia statute is a "crime of violence" under 18 U.S.C. § 16(a). If anything, causing physical harm to a victim under § 16-5-23(a)(2) is even more clearly a "crime of violence" than a simple physical touching of an insulting or provoking nature under § 16-5-23(a)(1)

question, he contends that when his probation was revoked, he was "resentenced" and given an "entirely new sentence" of twenty-two days in prison. The order revoking Hernandez's probation states otherwise.

The order revoking Hernandez's probation indeed states that Hernandez's probation was revoked and that he was to serve twenty-two days in the Gwinnett County jail. However, the order also provides that Hernandez's probation was "[c]ontinued. under supervision, subject to the further provision[s]" that Hernandez be: (1) given credit for time served; (2) "released instanter"; (3) enrolled in anger management; and (4) given a status check in sixty days. Probation Revocation Order of Dec. 2, 2005 (emphasis added). Because the order revoking Hernandez's probation makes clear that Hernandez was not given a "new sentence" of less than twelve months' imprisonment, but that his probation was continued, we cannot say that the BIA erred when it concluded that Hernandez was removable as an alien convicted of a "crime of violence" for which the term of imprisonment imposed was at least one year.

IV. CONCLUSION

For the foregoing reasons, we deny Hernandez's petition for review.

PETITION DENIED.

ENTERED April 27, 2007

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A70-952-769 – Atlanta Date: APR 27, 2007

In re: HERNANDEZ, MIGUEL ANGEL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
H. Glenn Fogle, Jr., Esquire

ON BEHALF OF DHS:
Joy Lampley-Fortson, Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent has appealed from the Immigration Judges's decision dated January 10, 2007. The Immigration Judge determined that the respondent's conviction for battery constituted an aggravated felony because it was a crime of violence for which the term of imprisonment was at least 1 year. *See* section 101(a)(43)(F) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1101(a)(43)(F). We agree. The respondent was convicted of simple battery under Section 16-5-23(a)(2) of the Official Code of Georgia, which punishes "intentionally caus[ing] physical harm to another." Because such an offense

"has as an element the use, attempted use, or threatened use of physical force against the person or property of another," it is a "crime of violence," as defined under 18 U.S.C. § 16(a). *See Matter of Martin*, 23 I. & N. Dec. 491, 494-95 (BIA 2002) (holding that "Congress unequivocally manifested its understanding that... offenses involving the intentional infliction or threatened infliction of 'injury' or 'bodily harm'... have as an inherent element the actual or threatened use of physical force" and are therefore crimes of violence under 18 U.S.C. § 16(a)). Our conclusion finds additional support in the decision of the United States Court of Appeals for the Eleventh Circuit in *Hicks v. Moore*, 422 F.3d 1246 (11th Cir. 2005), addressing the Georgia crime of battery, which is defined similarly to simple battery. In that case the court found that the crime of battery, defined under Section 16-5-23.1(a) of the Official Code of Georgia as intentionally causing substantial physical harm or visible bodily harm to another, "is obviously one of violence." *See Hicks v. Moore*, supra at 1252. We therefore conclude that the respondent has been convicted of a crime of violence. Because the respondent remains sentenced to 12 months' confinement for such crime, regardless of any additional sentence due to the revocation of probation, we affirm the Immigration Judge's conclusion that the respondent is removable as an alien convicted of an aggravated felony. *See* section 101 (a)(43)(F) of the Act; section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii). Accordingly, the appeal is dismissed.

/s/

FOR THE BOARD

No. 07-1322

In the Supreme Court of the United States

MIGUEL ANGEL HERNANDEZ, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether simple battery in violation of Ga. Code Ann. § 16-5-23(a)(2) is a "crime of violence" under 18 U.S.C. 16, and therefore qualifies as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F).

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In the Supreme Court of the United States

No. 07-1322

MIGUEL ANGEL HERNANDEZ, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 513 F.3d 1336. The opinions of the Board of Immigration Appeals and the immigration judge are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2008. The petition for a writ of certiorari was filed on April 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may be removed from the United States if he is convicted of an "aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii). The INA de-

fines the term "aggravated felony" to include a "crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F). Under 18 U.S.C. 16, a "crime of violence" is:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

2. Petitioner is a native and citizen of Mexico. He was admitted to the United States as a lawful permanent resident in September 2004. Pet. App. 3a. In March 2005, petitioner was convicted in Georgia state court of one count of simple battery. *Ibid.*; A.R. 52. Georgia's simple battery statute provides, in pertinent part:

> A person commits the offense of simple battery when he or she either:
>
> (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another; or
>
> (2) Intentionally causes physical harm to another.

Ga. Code Ann. § 16-5-23(a). Petitioner was convicted under the second subsection, for "[i]ntentionally caus[ing] physical harm to another." *Id.* § 16-5-23(a)(2); see Pet. App. 3a; A.R. 52. Petitioner was sentenced to 12 months of imprisonment, with six days of time served and the remainder to be served on probation. Pet. App.

3a; A.R. 52. Probation was later revoked, and petitioner served the final 22 days of his sentence in jail. Pet. App. 3a; A.R. 49.

In October 2006, the Department of Homeland Security (DHS) commenced removal proceedings against petitioner based on his 2005 conviction. DHS alleged, *inter alia*, that petitioner's offense qualified as a "crime of violence" under 18 U.S.C. 16, and that it was therefore an "aggravated felony" under 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 4a; A.R. 60-62. The immigration judge (IJ) found petitioner removable on that ground, and ordered petitioner removed to Mexico. A.R. 29-32.

3. The Board of Immigration Appeals (BIA) affirmed. A.R. 2. Citing its decision in *In re Martin*, 23 I. & N. Dec. 491, 494-495 (BIA 2002), as well as the Eleventh Circuit's decision in *Hicks* v. *Moore*, 422 F.3d 1246 (2005), the BIA concluded that the offense of which petitioner was convicted qualifies as a "crime of violence" under 18 U.S.C. 16(a), and is therefore an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F). A.R. 2.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court began by noting that Georgia courts have interpreted both prongs of the simple battery statute to require actual physical contact, but that Section 16-5-23(a)(2), as compared to Section 16-5-23(a)(1), has been interpreted to contemplate "a touching that goes beyond insult to the infliction of pain or physical injury." *Id.* at 7a (quoting *Hammonds* v. *State*, 587 S.E.2d 161, 163 (Ga. Ct. App. 2003)). The court noted that, in a prior decision, the Eleventh Circuit had held that Ga. Code Ann. § 16-5-23(a)(1) is an offense that "has, as an element, the use or attempted use of physical force" under the definition of "misdemeanor crime of domestic vio-

lence" in 18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005), having reasoned that "[a] person cannot make physical contact—particularly of an insulting or provoking nature—with another without exerting some level of physical force." Pet. App. 8a (quoting *United States* v. *Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006), cert. denied, 127 S. Ct. 2028 (2007)). In this case, the court noted, petitioner's conviction "required more than simple physical contact with the victim; it required intentionally causing *physical harm* to the victim through physical contact." *Id.* at 9a. The court accordingly concluded that petitioner's conviction qualifies as a "crime of violence" under 18 U.S.C. 16(a).

ARGUMENT

Petitioner renews his contention (Pet. 5-18) that his conviction for simple battery in violation of Ga. Code Ann. § 16-5-23(a)(2) is not a "crime of violence" under 18 U.S.C. 16. The court of appeals correctly rejected that contention, and its decision does not warrant further review.

1. Petitioner was convicted of violating a provision of Georgia law that makes it a criminal offense "intentionally [to] cause[] physical harm to another." Ga. Code Ann. § 16-5-23(a)(2). Georgia courts have interpreted that provision to "contemplate[] a touching" that results in "pain or physical injury." *Hammonds*, 587 S.E.2d at 163. The court of appeals correctly concluded that the conduct proscribed by Section 16-5-23(a)(2) constitutes a "use of physical force," and therefore qualifies as a "crime of violence" under 18 U.S.C. 16(a). See Pet. App. 12a. The court's conclusion is consistent with both the text and the history of the statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) (noting that 18 U.S.C.

16(a) was designed to include "a threatened or attempted simple assault or battery on another person").

2. Petitioner's primary submission (Pet. 7-8) is that Section 16-5-23(a)(2) does not qualify as a "crime of violence" because "[t]here are many things one could intentionally do to cause 'physical harm' without using or threatening physical force." Pet. 7. Petitioner offers a series of hypothetical examples, such as "drop[ping] a banana peel in the path of another," or "sneak[ing] up behind another on the edge of a balcony and scream-[ing], causing him to lose his balance and fall." *Ibid.* Petitioner makes no effort, however, to reconcile his argument with the Georgia court's interpretation of Section 16-5-23(a)(2) as requiring physical contact. See Pet. App. 12a n.4. Petitioner instead simply disputes (Pet. 14-15) that Section 16-5-23(a)(2), as opposed to Section 16-5-23(a)(1), has been so interpreted. Petitioner is mistaken. Both *Hammonds*, *supra*, and *Lyman* v. *State*, 374 S.E.2d 563 (Ga. Ct. App. 1988), cited in the court of appeals' opinion (at Pet. App. 7a-8a and 12a n.4), specifically concerned Section 16-5-23(a)(2), and in both cases, the court affirmed that Section 16-5-23(a)(2) contemplates physical contact that results in physical harm. See *Hammonds*, 587 S.E.2d at 163; *Lyman*, 374 S.E.2d at 565.

Moreover, petitioner fails to identify any case in which the statute has been applied in the manner he hypothesizes. Cf. *Gonzales* v. *Duenas-Alvarez*, 127 S. Ct. 815, 822 (2007) ("[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. * * * [An offender] must at least point to his own case or other cases in which the state courts in fact did apply

the statute in the special (nongeneric) manner for which he argues."). Petitioner offers (Pet. 15) only one example of a case in which the Georgia courts purportedly applied Section 16-5-23(a)(2) to conduct not involving physical contact or the use of physical force: *J.A.T.* v. *State*, 212 S.E.2d 879 (Ga. Ct. App. 1975), in which the court held that held that siccing a dog on another constitutes simple battery in violation of Section 16-5-23(a). *J.A.T.* lends no support to petitioner's argument. It is true, as petitioner notes (Pet. 15), that the defendant in *J.A.T.* did not "touch" the victim, in the sense that there was no *direct* physical contact between the parties; the defendant instead commanded his dog to accomplish the "touching." But the same might be said of a person who throws a rock at his victim, or who strikes his victim with his car, cf. *J.A.T.*, 212 S.E.2d at 880 (citing cases), or, for that matter, a person who aims a gun at his victim and pulls the trigger. In each case, the offender causes physical harm by making physical contact, whether direct or indirect, with the victim. In each case, the offender has used physical force against another.

3. Petitioner contends (Pet. 8-14) that review is warranted to resolve a conflict among the courts of appeals regarding whether statutes similar to Ga. Code Ann. § 16-5-23(a)(2) qualify as "crimes of violence." Petitioner's contention is without merit.

a. As an initial matter, most of the cases that petitioner cites concern statutes that are materially dissimilar to Ga. Code Ann. § 16-5-23(a)(2). *Larin-Ulloa* v. *Gonzales*, 462 F.3d 456 (5th Cir. 2006), held that a statutory provision proscribing "intentionally causing physical contact with another person * * * in any manner whereby great bodily harm, disfigurement or death can be inflicted," *id.* at 458 (quoting Kan. Stat. Ann.

§ 21-3414(a)(1)(C)), did not qualify as a Section 16(a) "crime of violence" because the provision "does not require that the defendant *intend to injure* or use force on the victim or that the physical contact itself be violent, harmful, offensive, or even non-consensual," *id.* at 466 (emphasis added) (footnotes omitted). Similarly, *Flores* v. *Ashcroft*, 350 F.3d 666 (7th Cir. 2003), held that a statutory provision that proscribes "knowingly or intentionally touch[ing] another person in a rude, insolent, or angry manner," where that touching "results in bodily injury to any other person," *id.* at 669 (quoting Ind. Code Ann. § 35-42-2-1(a)(1)(A)), did not qualify as a Section 16(a) "crime of violence" because the provision "does not make *intent to injure* an element of the offense," *id.* at 671 (emphasis added). See *id.* at 672 (holding that the "force" to which 18 U.S.C. 16 refers must be "the sort that is intended to cause bodily injury, or at a minimum likely to do so"). As petitioner himself acknowledges, "the statute at issue in the present case involves an intent to cause physical harm." Pet. 9. There is thus no conflict between the decision below and *Larin-Ulloa* or *Flores*.

Ortega-Mendez v. *Gonzales*, 450 F.3d 1010 (9th Cir. 2006), is also inapposite. In that case, the court held that a statutory provision proscribing "any willful and unlawful use of force or violence upon the person of another," *id.* at 1016 (quoting Cal. Penal Code § 242), did not qualify as a Section 16(a) "crime of violence" because it "requir[ed] neither a force capable of hurting or causing injury nor violence in the usual sense of the term," *id.* at 1016. *Ortega-Mendez* did not address the question whether a statute like Ga. Code Ann. § 16-5-23(a)(2), which requires proof of physical harm, would qualify under Section 16(a).

Finally, in *United States* v. *Arnold*, 58 F.3d 1117 (6th Cir. 1995), cert. denied, 519 U.S. 1019 (1996), the court considered the Tennessee offense of assault with intent to commit sexual battery, defined as unlawful sexual contact with another person accompanied by: (1) the use of force or coercion; (2) knowledge of the victim's mental deficiency or physical incapacitation; or (3) fraud. *Id.* at 1121-1122 (citing Tenn. Code Ann. § 39-2-607). The language of the statute made plain that "force may, but need not, be involved in an assault with intent to commit sexual battery under Tennessee law." *Id.* at 1122. The court did not consider whether the offense of "intentionally caus[ing] physical harm" to another, Ga. Code Ann. § 16-5-23(a)(2), is an offense that has, as an element, the use, attempted use, or threatened use of force.*

b. The court of appeals' conclusion that intentionally causing physical harm to another is an offense that has a use-of-force element is consistent with decisions of the First and Eighth Circuits. See *United States* v. *Nason*, 269 F.3d 10, 20 (1st Cir. 2001) (Maine assault statute punishing the intentional, knowing, or reckless causation of bodily injury qualifies as a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A) (2000

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* Petitioner also cites (Pet. 7, 14) *Gonzales-Garcia* v. *Gonzales*, 166 Fed. Appx. 740 (5th Cir. 2006) (unpublished), in which the court held that an assault statute punishing persons who "intentionally or knowingly cause[] physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative," *id.* at 744 (quoting Tex. Penal Code Ann. § 22.01(a)(3)), is not a "crime of violence" under 18 U.S.C. 16(a). The question in this case is not, however, whether an assault statute punishing "offensive or provocative contact" qualifies as a Section 16(a) "crime of violence." The battery statute here at issue requires proof of the intentional causation of physical harm. See Ga. Code Ann. § 16-5-23(a)(2).

& Supp. V 2005)); *United States* v. *Smith*, 171 F.3d 617, 621 (8th Cir. 1999) (Iowa assault statute punishing the commission of an act intended to cause pain or injury qualifies as a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005)).

Other courts have concluded that, standing alone, statutory language proscribing the intentional infliction of physical harm does not describe an offense that has a use-of-force element. See *Chrzanoski* v. *Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (Connecticut assault statute punishing intentional causation of injury to another person does not qualify as a "crime of violence" under 18 U.S.C. 16(a)); *United States* v. *Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006) (Texas assault statute punishing intentional, knowing, or reckless causation of bodily injury does not qualify as an "aggravated felony" under Sentencing Guidelines § 2L1.2(b)(1)(C), cert. denied, 128 S. Ct. 1351 (2007)); *United States* v. *Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005) (Colorado assault statute punishing knowingly or recklessly causing bodily injury to another person does not have a use-of-force element, and therefore does not qualify as a "crime of violence" under Guidelines § 2L1.2(b)(1)(A)). In those cases, the courts reasoned that "the intentional causation of injury does not necessarily involve the use of force," because injury can also be caused by "guile, deception, or even deliberate omission." *Chrzanoski*, 327 F.3d at 195; accord *Perez-Vargas*, 414 F.3d at 1286-1287; see *Villegas-Hernandez*, 468 F.3d at 879 ("[I]njury could result from any of a number of acts, without use of 'destructive or violent force', making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing

an approaching car driven by an independently acting third party will hit the victim.").

The decision below is not, however, inconsistent with those decisions. As the court of appeals emphasized (Pet. App. 7a-9a, 12a n.4), Georgia courts have interpreted Ga. Code Ann. § 16-5-23(a)(2) to require proof of "a touching that goes beyond insult to the infliction of pain or physical injury." Pet. App. 7a (quoting *Hammonds*, 587 S.E.2d at 163). That interpretation precludes application of Section 16-5-23(a)(2) to conduct involving only "guile, deception, or * * * deliberate omission," *Chrzanoski*, 327 F.3d at 195, unaccompanied by any application of force.

It is true, as petitioner points out (Pet. 9-10), that the Fifth Circuit has held that Georgia's family-violence battery provision, Ga. Code Ann. § 16-5-23.1(f), does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," and thus is not a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A). *United States* v. *Lopez-Hernandez*, 112 Fed. Appx. 984, 985 (5th Cir. 2004) (per curiam) (quoting Sentencing Guidelines § 2L1.2, comment. (n.1(B)(ii)(I))), cert. denied, 543 U.S. 1177 (2005). Although the Georgia family-violence battery provision is not the "exact statute" at issue here, Pet. 9, it is similar to Ga. Code Ann. § 16-5-23(a)(2): Much like the simple battery statute, it punishes "intentionally caus[ing] substantial physical harm or visible bodily harm." Ga. Code Ann. § 16-5-23.1(a) and (f). The Fifth Circuit concluded that family-violence battery does not have a use-of-force element because it "does not contain a requirement that the offender apply force, but rather, leaves open the possibility that harm to the victim might result from omission or from the actions of

another person or animal controlled by the offender." *Lopez-Hernandez*, 112 Fed. Appx. at 985 (citing *J.A.T.* v. *State*, 212 S.E.2d 879).

This Court's review is not, however, warranted to resolve any tension between *Lopez-Hernandez* and the decision below. The Fifth Circuit's decision in *Lopez-Hernandez* is unpublished and non-precedential. It concerned the meaning of a Sentencing Guideline, rather than a federal statute. It did not consider the fact that Georgia's battery statute has been interpreted to require physical contact, see, *e.g.*, *Martin* v. *State*, 629 S.E.2d 134, 135 (Ga. Ct. App. 2006), nor did it explain why directing an animal to injure a victim, as in *J.A.T.*, would not qualify as a "use of physical force." Moreover, it relied primarily on the Fifth Circuit's prior decision in *United States* v. *Calderon-Pena*, 383 F.3d 254 (2004) (per curiam) (en banc), cert. denied, 543 U.S. 1076 (2005), which held that "knowingly * * * engag[ing] in conduct that places a child younger than 15 years in imminent danger of * * * bodily injury," *id.* at 260 (quoting Tex. Penal Code Ann. § 22.041(c)), lacks a use-of-force element and thus does not qualify as a "crime of violence" under Sentencing Guidelines § 2L1.2. *Calderon-Pena*, 383 F.3d at 260; see *Lopez-Hernandez*, 112 Fed. Appx. at 985. The Fifth Circuit has recently called for en banc reconsideration of *Calderon-Pena*, see *United States* v. *Gomez-Gomez*, No. 05-41461 (argued en banc May 22, 2008), which suggests that the Fifth Circuit may harmonize its decisions with the view that an offense involving the intentional infliction of physical harm is one that has, as an element, the use of physical force. For that reason as well, review is not warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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